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No. 91-397

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In the Supreme Court of the United States

OCTOBER TERM, 1991

CITIZENS AGAINST BURLINGTON, INC., ET AL.,
PETITIONERS

v.

JAMES B. BUSEY, IV, ADMINISTRATOR, FAA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an environmental impact statement prepared by the Federal Aviation Administration (FAA) on an application by the Toledo-Lucas County Port Authority to revise its airport layout plan and for funding to expand the Toledo Express airport to accommodate a major cargo hub, was deficient for failure to give detailed consideration to the alternative of having the private operator of the hub remain at its present temporary location in Fort Wayne, Indiana.

2. Whether the FAA's finding under Section 509 (b) (5) of the Airport and Airway Improvement Act, 49 U.S.C. App. 2208(b) (5), that all reasonable steps have been taken to minimize harm from noise generated by the cargo hub was arbitrary or capricious.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-46a, is reported at 938 F.2d 190. The record of decision of the Federal Aviation Administration, Pet. App. 49a-134a, is unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47a) was entered on June 14, 1991. The petition for a writ of certiorari was filed on September 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Toledo-Lucas County Port Authority (Port Authority) operates the Toledo Express Airport. Pet. App. 49a. In 1987, an air cargo operator, Burlington Air Express, Inc. (Burlington), approached the Port Authority, seeking to establish a permanent cargo hub after having operated at a temporary facility in Fort Wayne, Indiana, since 1985. Pet. App. 50a. Burlington had examined 17 airports in four Midwestern states as potential sites for a permanent hub, but determined that Toledo was the optimum location for a hub because of the quality of its work force, the airport's prior operating record, its location near Burlington's crucial automotive markets, and the Port Authority's ability to provide financing for necessary facilities. Pet. App. 3a.

On February 2, 1989, the Port Authority submitted to the Federal Aviation Administration (FAA) proposed revisions to its Airport Layout Plan showing runway extensions, a new taxiway, a sorting facility, ramps, and other facilities needed to support a permament cargo hub. Pet. App. 3a-4a. The FAA reviews such plan revisions to see that the changes do not compromise the airport's safety, utility, or efficiency, 49 U.S.C. App. 2210(a)(15), or conflict with applicable environmental restrictions. Pet. App. 51a-52a.

Pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), the FAA prepared an environmental impact statement (EIS) evaluating the proposal. After holding a public hearing and considering comments on a draft EIS, the FAA issued its final EIS (FEIS) in May 1990. The FEIS contained a detailed discussion of the environmental impacts of construction and operation of the cargo hub. Pet. App. 4a-5a, 21a-24a. That aspect of the FEIS is no longer at issue.

The FEIS also considered alternatives to the proposal, as required by 42 U.S.C. 4332(2)(C)(iii). It included an in-depth analysis of the proposed action of expanding the Toledo airport and the no-action alternative. See FEIS 2-2 to 2-6, 2-13 to 2-14, 4-1 to 4-68. It also considered alternative designs and runway configurations, FEIS 2-7 to 2-10, alternative distribution of projected air traffic at Toledo, FEIS 2-10 to 2-13, and the possibility of locating the hub at other airports inside and outside of Toledo, FEIS 2-14 to 2-16.

With respect to the Fort Wayne airport, the FEIS noted that it is (a) antiquated and not designed specifically as a cargo hub, (b) farther than Toledo from Burlington's markets in Detroit, and (c) unconnected to major highways. FEIS 2-15. The FEIS also noted Burlington's difficulty in attracting skilled workers in Fort Wayne and Fort Wayne's inability to put together a competitive funding package for improvements needed to create an efficient hub. FEIS 2-15.

The FEIS and the FAA's Record of Decision (ROD) presented a detailed plan for mitigating the noise impacts of the proposal by eliminating almost all existing incompatible land uses within the most heavily affected area. Pet. App. 68a-71a; FEIS 4-32 to 4-39. Approximately 100 residences and two nursing homes will be acquired, and their residents will be relocated. Pet. App. 68a. The Port Authority will create a "relocation team" to accomplish this process with as little disruption as possible to residents. Pet. App. 72a-73a. The Port Authority has also committed to implement a sound attenuation and easement acquisition program for houses outside the acquisition zone. Pet. App. 69a. The FAA will assure that these commitments are carried out by making mitigation

a condition of grant approvals. Pet. App. 129a. In addition, a Noise Compatibility study, 14 C.F.R. Pt. 150, being carried out by the Port Authority "will provide valuable input on timing and priorities in this program." Pet. App. 69a.

2. After the FAA issued its ROD, petitioners filed a petition for review challenging the FAA's decision under Section 102(2)(C) of NEPA, 42 U.S.C. 4332 (2)(C), Section 4(f) of the Department of Transporation Act (49 U.S.C. 1653(f) (1976), recodified, 49 U.S.C. 303(c)) and Section 509(b)(5) of the Airport and Airway Improvement Act (AIAA), 49 U.S.C. App. 2208(b)(5). Petitioners' request for a stay of the agency decision pending review was denied by the court of appeals on August 1, 1990.

The court of appeals rejected all of petitioners' claims, with one exception.[1] The majority first addressed the FEIS's discussion of alternatives to the proposed federal action.[2] The court observed that an

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[1] The court found that the FAA had violated the Council on Environmental Quality's NEPA regulations by delegating to the Port Authority responsibility for selecting a consultant to assist in preparing the EIS. Pet. App. 25a-26a (citing 40 C.F.R. 1506.5(c)). The court concluded, however, that this error did not compromise the objectivity or integrity of the NEPA process. Pet. App. 26a. After finding, however, that the consultant had not completed a disclosure form required by regulation, the court ordered the FAA to have the appropriate form executed and to determine whether a conflict of interest existed. *Id.* at 26a-27a. On September 5, 1991, the consultant submitted its statement. On October 2, 1991, the FAA issued a finding that there was no conflict of interest. Petitioners have not raised that issue here.

[2] Judge Buckley dissented on the issue of alternatives. In his view, the FAA failed to inquire adequately into the feasibility of other locations for Burlington's operation and failed to consider the economic impacts of Burlington's move on Fort Wayne. Pet. App. 37a-46a.

agency is required to analyze only "reasonable" alternatives, and that a reasonable alternative must bring about the ends of the federal action at issue. Pet. App. 10a. While noting the FAA's statutory mandate to nurture the establishment of air cargo hubs, *id.* at 13a, 15a, the court also observed that Congress had made the free market, and not the FAA, arbiter of where private companies should locate such hubs. *Id.* at 15a-16a. Because the Port Authority's proposal was directed to creating an efficient cargo hub *at Toledo*, the court found it reasonable for the FAA to restrict its analysis to alternatives that would accomplish that goal. *Id.* at 16a-17a, 30a. The court finally rejected petitioners' contention that the FAA should have defined the proposal's "general goal" as building a permanent hub for Burlington, for which Fort Wayne was in their view a reasonable alternative. *Id.* at 18a-20a.

The court next upheld the adequacy of the FEIS's discussion of noise impacts from the proposed hub. Pet. App. 21a-24a. The court also affirmed the FAA's determination, pursuant to Section 4(f) of the Department of Transportation Act (49 U.S.C. 303(c)), that there was no "prudent and feasible alternative" to the proposal's "use" (through increased noise) of a nearby campground, and that moving the campground to a quieter area satisfied the necessity for "all possible planning to minimize harm." Pet. App. 27a-32a. Finally, the court sustained the FAA's findings under Section 509(b)(5) of the AAIA, 49 U.S.C. App. 2208(b)(5), that leaving Burlington's hub in Fort Wayne was not a "feasible and prudent alternative" to the proposal, and that "all reasonable steps have been taken" to minimize the proposal's adverse effects. Pet. App. 32a-37a. In connection with the requirement of taking "reasonable steps" in

mitigation, moreover, the court determined that the FAA had "reasonably concluded that a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" *Id.* at 36a.[3]

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court. In addition, while the court's opinion criticizes the reasoning of a decision of the Court of Appeals for the Seventh Circuit, there is no direct conflict between the two decisions. In any event, the decision below turns on the particular circumstances of this case and presents no question of general importance meriting the review by this Court.

1.a. As the court of appeals opinion observes, Pet. App. 9a-10a, NEPA's requirement that an agency consider "alternatives to the proposed action," 42 U.S.C. 4332(2)(C)(iii), "must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978). Thus, compliance with the requirement that an agency's EIS consider alternatives to the proposed action is evaluated under a "rule of reason." *E.g.*, *Allison* v. *Department of Transportation*, 908 F.2d 1024, 1031 (D.C. Cir. 1990); *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987); *City of New York* v. *Department of Transportation*, 715 F.2d 732, 742-743 (2d Cir. 1983),

[3] Construction of the sorting facility, ramp, and related facilities was completed in August 1991, and Burlington moved its operations to Toledo that same month. Operations began in September, and construction of the runway extension is ongoing.

cert. denied, 465 U.S. 1055 (1984).[4] Moreover, the question of what constitutes a reasonable alternative, such that an agency must consider in detail its environmental impact, is necessarily informed by the objectives of the proposal before the agency. Pet. App. 10a; accord, *e.g.*, *City of Angoon*, 803 F.2d at 1021; *Louisiana Wildlife Federation* v. *York*, 761 F.2d 1044, 1048 (5th Cir. 1985); *City of New York*, 715 F.2d at 742-743; *Roosevelt Campobello International Park Comm'n* v. *EPA*, 684 F.2d 1041, 1046-1047 (1st Cir. 1982). The responsibility for defining the objectives of an action is committed to the agency's judgment in the first instance. *City of Angoon*, 803 F.2d at 1021.

Petitioners do not dispute those governing principles, but contend that the court of appeals misapplied them in this case. Specifically, petitioners claim that the FAA erred in defining the purpose of the relevant proposal as being to create a cargo hub in Toledo. In their view, the FAA should have defined the proposal's goals in terms of Burlington's need for a new cargo facility, a need which they contend could have been fulfilled in Fort Wayne as easily as in Toledo. Pet. 17-19.[5] The FAA's failure to focus on Burling-

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[4] The governing regulations confirm that reasonableness is the guiding standard for evaluating the range of alternatives addressed by an EIS. See 40 C.F.R. 1502.14(a) (agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated"); Section 1502.14(c) (agency shall "[i]nclude reasonable alternatives not within the jurisdiction of the lead agency"); Section 1508.25(b)(2) (scope of EIS must consider "[o]ther reasonable courses of actions").

[5] In the court of appeals, as here, petitioners argued that Fort Wayne was the only alternative location that the FAA was required to consider in its EIS. Pet. 10 n.4.

ton's objective, petitioners contend, violated NEPA by relying on the Port Authority's "preference" for a Toledo-based cargo hub to define the range of alternatives for purposes of the EIS. Pet. 13.

That fact-specific contention, however, is without merit. The FEIS prepared by the FAA in this case fully complied with the Council on Environmental Quality's (CEQ) interpretations of NEPA, which are "entitled to substantial deference." *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979). The FEIS "rigorously explored and objectively evaluated" the impacts of "all reasonable alternatives," and it included "other alternatives, which [were] eliminated from detailed study with a brief discussion of the reasons for eliminating them." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981) (*NEPA Questions*). Even if, as petitioners claim, the objective of the proposal before the FAA was properly viewed from the perspective of Burlington's transportation needs, the FAA properly considered, and rejected as infeasible, the creation of a cargo hub at Fort Wayne. See Pet. App. 59a; FEIS 2-15. In finding that Fort Wayne was not a reasonable alternative, the FAA cited (a) difficulties in ground travel between the Fort Wayne airport and Burlington's principal markets, (b) the inadequacy of the local labor pool in Fort Wayne, (c) needed improvements in Fort Wayne's airport facilities, and (d) a shortfall in financing necessary to make improvements. *Ibid.* As the CEQ has instructed, "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense." *NEPA Questions*, 46 Fed. Reg. 18,027 (1981) (emphasis omitted). Thus, contrary

to petitioners' contention, Pet. 16, the FAA's elimination of Fort Wayne from further consideration properly rested on valid reasons consistent with the CEQ guidelines.[6] There is no basis for the contrary conclusion, advanced by petitioners, that the FAA improperly defined the reasonable alternatives as being those which were "simply desirable from the standpoint of the applicant." *NEPA Questions*, 46 Fed. Reg. 18,027 (1981) (emphasis omitted).

In any case, what the FAA had before it was in fact the Port Authority's proposal for a Toledo-based cargo hub. Contrary to the suggestion of petitioner, Pet. 17, and the dissent, Pet. App. 44a-45a, it was not error for the court of appeals to credit the project applicant's objectives in determining what reasonable alternatives could achieve the goals of the proposed federal action. *Id.* at 16a-18a. Such a focus not only is logically inevitable when a federal agency is asked to approve the specific proposal of a nonfederal entity, but also is in accord with the CEQ's interpretation of NEPA. In clarifying the criteria for evaluating alternatives to a proposal by a permit or license applicant, the CEQ approvingly cited and discussed the First Circuit's decision in *Roosevelt Campobello*, *supra*, which had approved EPA's processing under NEPA of a permit application for a refinery and deep-water terminal. *Guidance Regarding*

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[6] The dissent, Pet. App. 40a-43a, faulted the thoroughness of the FAA's inquiry into the technical and economic factors that supported its conclusion that Fort Wayne was not a reasonable alternative. As discussed, however, the FAA cited very specific considerations supporting its conclusion that Fort Wayne was not a viable alternative to Toledo as a cargo hub for Burlington. In any case, the fact-specific disagreement between the majority and dissent in this case does not warrant further review by this Court.

NEPA Regulations, 48 Fed. Reg. 34,263, 34,267 (1983). Of direct relevance here, the CEQ approvingly observed that "[t]he court determined that EPA's choice of alternative sites was 'focused by the primary objectives of the permit applicant . . .' and that EPA had limited its consideration of sites to only those sites which were considered feasible, given the applicant's stated goals." *Ibid.* (quoting *Roosevelt Campobello*, 684 F.2d at 1047). This, the CEQ concluded, was "in keeping with the concept that an agency's responsibilities to examine alternative sites has always been 'bounded by some notion of feasibility' to avoid NEPA from becoming 'an exercise in frivolous boilerplate.'" 48 Fed. Reg. 34,267 (1983) (quoting *Vermont Yankee*, 435 U.S. at 551). Hence, petitioners' argument, Pet. 17, that the FAA's selection of reasonable alternatives for environmental impact analysis could not be informed by the Port Authority's project goals is misplaced.[7]

Finally, as the court of appeals properly concluded in this case, Pet. App. 15a-16a,[8] Congress has given air carriers, and not the FAA, the right to determine the optimum routing of cargo. Thus, the Federal Aviation Act provides that it is "in the public interest, and in accordance with the public convenience and necessity" for regulators to place "maximum reliance on competitive market forces and on actual and po-

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[7] Petitioners thus also err in asserting, Pet. 16-17, that the court created a new standard for proposals by private applicants.

[8] The court, Pet. App. 15a, cited, *inter alia*, the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, and the accompanying signing statement, 14 Weekly Comp. Pres. Doc. 1837, 1838 (Oct. 24, 1978), which embraced a free-market approach to the regulation of air transportation.

tential competition * * * to provide [for] the needed air transportation system." 49 U.S.C. App. 1302 (a)(4). In addition, with respect to all-cargo service, the Act further provides that it is in the "public interest" for regulators to achieve "[t]he encouragement and development of an integrated transportation system, relying upon competitive market forces to determine the extent, variety, quality, and price of such services." Section 1302(b)(2). Thus, petitioners err in asserting, Pet. 19-20, that the FAA acted improperly in addressing the merits, *vel non*, of the proposal before it, rather than using NEPA to evade the market-oriented policy established by Congress and instead to determine whether the public interest would be better served by having Fort Wayne, rather than Toledo, as Burlington's cargo hub.[9] Cf. *Suburban O'Hare Comm'n* v. *Dole*, 787 F.2d 186, 196 (7th Cir.) ("The decision to make O'Hare, or any other airport, a 'hub' airport belongs to the airlines and not to the Government."), cert. denied, 479 U.S. 847 (1986).

b. The decision of the court of appeals in this case does not conflict with *Van Abbema* v. *Fornell*, 807 F.2d 633 (7th Cir. 1986), which arose in a distinct legal and factual context. There, a private company applied for a permit under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 403, to place a dock in a navigable waterway. 807 F.2d at 636. Before granting such a permit, the Army Corps of Engineers must not only comply with NEPA but also perform a "public interest review," in which it ex-

[9] As the court correctly observed, Pet. App. 15a, moreover, the FAA's decision here also comports with Congress's direction to foster the development of cargo hubs. See 49 U.S.C. App. 2201(a)(7) and (11).

plicitly balances the benefits of the proposed facility against reasonably foreseeable detriments. *Id.* at 638 (citing 33 C.F.R. 320.4(a)). In view of the requirement in the applicable regulations that the Corps "conduct an overall public welfare review," the court of appeals held that the Corps, "as guardian of the public welfare, * * * must credibly attempt to appraise [the] economic benefit" arising from the proposal. 807 F.2d at 639. The Corps therefore could not merely rely on the free market to determine that the proposal in question, and not some alternative, would serve the overall public welfare. *Ibid.*

In contrast to the corps' legal responsibilities considered in *Van Abbema*, the FAA's preparation of the FEIS occurred in a statutory context that commits the allocation of cargo services to the free market. As discussed, the FAA is without authority to determine that the public welfare would be better served if Burlington were to select a cargo hub other than Toledo. Rather, Congress has explicitly deemed it in the public interest to leave such determinations to "competitive market forces." 49 U.S.C. App. 1302(a)(4) and (b)(2). Because Congress has chosen to rely on the market, and not a federal agency, to allocate resources in this context, it was not aribtrary or capricious of the FAA to have forgone extensive inquiry into the environmental impacts of an alternative that it, but not Burlington, might have viewed as preferable to Toledo. Accordingly, *Van Abbema* and the decision here involve differing statutory and regulatory responsibilities and hence are not in conflict.

The *Van Abbema* court also concluded that the Corps' consideration of alternatives was inadequate based on specific allegations that much of the infor-

mation the Corps received was "inaccurate and unverified." 807 F.2d at 642. After examining the data submitted by the applicant regarding six alternative sites for the proposed facility, the court concluded that the Corps had "relie[d] upon a record replete with important factual inconsistencies and ambiguities that the Corps did not attempt to resolve." *Ibid.* In contrast, petitioners here have claimed not that the FAA based its decision on erroneous underlying data, but that the agency should have assembled additional data in order to identify and analyze another business alternative that Burlington may have had.

It is true that the majority in this case criticized, Pet. App. 19a, the *Van Abbema* court's observation that agencies should evaluate the "alternative means to accomplish the general goal of an action; * * * [and] not * * * the alternative means by which a particular applicant can reach his goals." 807 F.2d at 638 (emphasis omitted). Petitioners, however, would not be entitled to relief here based on the formulation criticized. Particularly in view of the FAA's statutory obligation to foster the development of new cargo hubs, 49 U.S.C. App. 2201(a)(7) and (11), it is far from self-evident that providing a cargo hub for a particular carrier (Burlington) is a more "general" goal than establishing a new cargo hub in a particular city (Toledo). *Van Abbema*, moreover, can be read consistently with the view that the latter is the "general goal" of the federal action here. The *Van Abbema* court identified the relevant "general goal" in that case as being "to deliver coal from mine to utility," 807 F.2d at 638, a goal that could be achieved through means other than building a facility at the site proposed by the applicant. But what is crucial is that the goal, however generally defined, was nonethe-

less defined in terms of the federal action sought by *the project applicant*, who would be making the coal deliveries in question. *Id.* at 635. In this case, the applicant is the Port Authority, and the "general goal" of the action *it* seeks—the creation of a cargo hub in Toledo—can be achieved only in Toledo.[10]

2. Under the AAIA, § 509(b)(5), 49 U.S.C. App. 2208(b)(5), the FAA may not approve a project having a significant adverse effect on the environment unless it finds that "no feasible and prudent alternative exists and that all reasonable steps have been taken to minimize [the] adverse effect." Petitioners contest, Pet. 20-24, the FAA's finding that the commitments obtained from the Port Authority for a program of property acquisition and sound insulation, see pp. 3-4, *supra*, were "reasonable steps" to minimize the adverse effects of noise from the cargo hub.[11] Their claim, which reduces to a disagreement

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[10] Moreover, petitioners have cited nothing in NEPA, its implementing regulations, or any decision construing it, that suggests that the goal of a proposal must be defined to maximize the number of alternative ways of achieving it. Requiring a project's goals always to be defined at the *most* alternative-intensive level of generality would offend the "[c]ommon sense * * * teach[ing] * * * that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man." *Vermont Yankee*, 435 U.S. at 551.

[11] Petitioners do not independently contest the court's conclusion that the FAA's approval of the project complied with § 509(b)(5) of the AAIA, 49 U.S.C. App. 2208(b)(5), and § 4(f) of the Department of Transportation Act (49 U.S.C. 303(c)), because of the absence of a "feasible or prudent" alternative. Pet. App. 27a-31a, 33a. Rather, they argue merely that a violation of NEPA's requirement to consider alternatives to a proposal would also violate those other two

with the FAA over what steps were reasonable on the facts and circumstances of this case, merits no further review.

The court of appeals properly found, based on the Port Authority's commitments, that the FAA reasonably concluded that "all reasonable steps have been taken to minimize" the project's adverse effects. 49 U.S.C. App. 2208(b)(5); Pet. App. 36a. Respondents contend, without citation of a single case interpreting the statute, that the AAIA's use of the phrase "have been taken" precludes the FAA from relying on commitments for future mitigation activities. That argument cannot be squared with the realities of administering the AAIA. Because the FAA must make its finding when it approves a project, the actual mitigation steps cannot have been taken at that time (particularly since mitigation may be funded by grants which are themselves contingent on the approval). Thus, it is clear that Congress contemplated that the adoption of realistic mitigation plans and commitments might constitute "reasonable steps" to be taken at the time of project approval.[12]

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statutes. Pet. 11 n.5. As discussed, the FAA did not violate NEPA. In any case, assuming *arguendo* that Fort Wayne was a "reasonable" alternative requiring further study in the EIS, it would not necessarily follow that it was a "prudent" alternative for purposes of the AAIA and the Department of Transportation Act. See Pet. App. 29a-31a.

[12] Apparently realizing that mitigation cannot possibly be completed at the time of approval, petitioners fall back on the argument that it must be completed at the time the project first begins operation or at least be implemented through a firm timetable. Pet. 22. Petitioners, however, again fail to cite a single decision supporting their inflexible view of a statute that requires "reasonable" steps to be taken.

As the court below pointed out, "[S]ection 509 (b)(5) does not order agencies to take *all* steps to lessen environmental trauma, just all *reasonable* ones." Pet. App. 36a. In this case, the FAA reasonably concluded that the establishment of "a detailed mitigation plan, coupled with grounds to believe that the plan will be implemented, is enough of a 'reasonable step.'" [13] *Ibid.* Indeed, the FAA specifically committed to take appropriate steps—*e.g.*, conditioning grants on mitigation—to ensure that the Port Authority's program would be implemented. Pet. App. 67a.[14] The court of appeals properly upheld the FAA's conclusion that all reasonable steps had been

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[13] The FAA's decision in this case specified that the Port Authority had committed to purchase homes within the area bounded by the 75 Ldn noise contour and to install insulation in homes and acquire easements in the area between the 65 and 75 Ldn noise contours. Pet. App. 68a-70a. The EIS estimated the cost of this program, FEIS 4-32, and included maps showing which houses fell within the 65 and 75 Ldn contours. The FAA also explained that a study being conducted pursuant to 14 C.F.R. Pt. 150 would further indicate how to minimize noise, and noted that the FAA was imposing conditions on its grants to ensure the Port Authority's compliance. Pet. App. 67a, 69a-71a.

[14] FAA stated its expectation that an ongoing noise study under 14 C.F.R. Pt. 150 would "provide valuable input on timing and priorities" for the mitigation program. Pet. App. 69a. Petitioners imply, Pet. 21 n.8, that the EPA opposed the FAA's reliance on the ongoing Part 150 Noise Compatibility study to fine tune the mitigation program. However, the EPA's official position, as stated in a letter from the EPA Director of the Office of Federal Activities, was that FAA's FEIS was "not 'Environmentally Unsatisfactory,'" based in part on the Port Authority's commitment to broaden its Part 150 study. C.A. App. 51. Thus, EPA relied on the Part 150 study to find that the project was acceptable. That study was completed in August 1991, and is under review at the FAA.

taken,[15] and further review of this factbound question is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1991

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[15] Petitioners' suggestion, Pet. 23, that the court of appeals ignored the difference between procedural and substantive mitigation requirements is incorrect. See Pet. App. 36a (drawing a distinction between NEPA's procedural dictates and the AAIA's "substantive environmental obligations").

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